



ENVIRONMENTAL RESTORATION

U.S. Army Environmental Center

LAND USE CONTROLS

Definition of Land Use Controls

Land Use Controls, or LUCs, include any type of physical, legal, or administrative mechanism that restricts the use of, or limits access to, real property to prevent exposure to hazardous substances above levels that may pose a risk to human health and the environment.

- ❖ Physical mechanisms encompass a variety of engineered remedies to contain or reduce contamination, and/or physical barriers intended to limit access to property, such as fences and signs
- ❖ Legal mechanisms include restrictive covenants, equitable servitudes, and deed notices¹
- ❖ Administrative mechanisms include notices and existing construction permitting or land use management systems that may be used to ensure compliance with use restriction

Background

The Department of Defense (DoD) issued an interim policy on LUCs associated with environmental restoration activities (August 31, 2000). Additionally, the Army has had guidance in the field since September, 1998. The primary purpose of these guidance memorandums is to direct installations on how to incorporate future land use into the environmental restoration process.

Anticipated “future land use” assumptions typically made before completing any CERCLA investigation may be based on various factors, including statutory land use designations, contractual arrangements for property transfer, zoning, community reuse plans, and installation master plans. The application of future land use assumptions may result in a remedy decision and remedial action under CERCLA, or may result in not requiring a response action. When a remedy is selected under CERCLA that involves restricting land use, LUCs are the mechanism to ensure that future activity remains consistent with the use restrictions.

General Rule and Exception

Any LUC imposed because of a possible CERCLA risk at a site constitutes a “remedy” under CERCLA and must be considered and selected in accordance with the CERCLA remedy selection process. For example, if protection of human health and the environment at a particular site is dependent upon restricting future land use in a manner consistent with use assumptions made in the risk assessment, such land use restrictions are “imposed because of a possible CERCLA risk at a site,” and constitute a CERCLA remedy.

There are circumstances, however, when there is an unusually high level of certainty that land use will not change in the future, for example, special legislation or other statutory requirements directing a specific use of the property. In these specific cases when it is determined that contaminant levels present no unacceptable human health risk based on this mandated future use (during screening or through a site-specific health risk assessment), any restrictions based upon the mandated future use are not viewed as “imposed because of a CERCLA risk at a site” and therefore do not constitute remedies. With respect to such sites, it can be concluded that no further action is required at the site.

Follow-on documentation should be prepared to memorialize exposure assumptions made, as well as results of the baseline risk assessment or risk-based screenings. For transferring property, any restrictions based on the exposure assumptions should be captured in the No Further Action Decision Document and in the Findings of Suitability to Transfer or Lease. For active installations, restrictions imposed on the use of the property should be recorded in the installation Master Plan.

Requirements Applying to both Transferring Property and Active Installations

Feasibility Studies (FSs): For all FSs initiated after October 31, 2000², selection of a remedy with a LUC should include an analysis of the long-term costs of maintaining the LUC and an analysis of the costs associated with selection of a remedy which will clean up the property to “unrestricted use.” This will enable decision-makers to compare the life-cycle costs of remedies with LUCs to other alternatives.

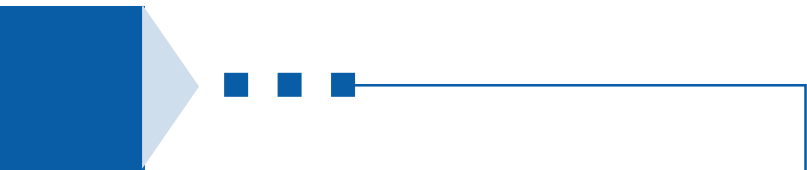
Decision Documents (DDs): When documenting environmental restoration decisions regarding remedy selection, the Record of Decision (ROD), DD, or Action Memorandum (AM) should describe the exposure scenario that was used to select the remedy. Also included should be the assumptions made concerning current and reasonably anticipated future land uses(s) along with a specification of the allowable uses of the property and/or prohibitions of activities on the property.

If the decision is made to take no further action, a ROD/DD must also be prepared. This document should outline the rationale behind the decision and include relevant exposure assumptions and documentation of the reasonably anticipated future land use. Any currently existing restrictions on land use that were used to make this determination should be described.

LUC Implementation: Protection of human health and the environment is a requirement of the environmental remediation process. The Army must ensure that this requirement is met, even when the property is no longer under direct Army control. To ensure that LUCs remain effective, installations should put appropriate control mechanisms in place to manage LUCs and should incorporate LUCs into existing land management processes of the locality (for property being transferred out of Federal control) or the installation (for Army-controlled property).

More detailed information regarding the use of a layering strategy or a system of mutually reinforcing controls is described in DoD’s *Interim Policy on Land Use Controls Associated with Environmental Restoration Activities*, August 31, 2000.

LUC Database: Currently, the Army tracks the selection and management of LUCs in the Defense Site Environmental Restoration Tracking System (DSERTS). When a remedy selection includes a LUC, installations



are required to input that information in DSERTS. Information captured in DSERTS includes the following:

- ❖ Title of the LUC
- ❖ Location/Applicable restoration area (i.e., CERCLA, RCRA, CERCLA/RCRA, or UXO)
- ❖ Record of the LUC (i.e., type of document where the LUC is recorded, such as FOST)
- ❖ LUC enforcement (e.g., 5-year reviews, transferee reporting, etc.)
- ❖ In-place date
- ❖ Actual Termination Date
- ❖ Type of Engineering Control
- ❖ Type of Institutional Control
- ❖ Description of Control

For more information regarding these DSERTS data elements, refer to the draft Army document, “Land Use Controls/Institutional Controls Management Guidance.”

LUC Modification/Termination: LUCs should be modified or terminated through the same process used to establish the LUC, and if terminated, deleted from the annotation mechanisms in which the LUC was recorded (e.g., Installation Master Plan, Construction/Planning Office, etc.). Upon modification or termination of a LUC, the layering mechanism must be undone to avoid future confusion about the status of the property.

Memorandums of Agreement/ Understanding (MOA/Us): Although it is preferable to use existing processes and mechanisms in the development, implementation, and management of LUCs, sometimes a separate agreement with a regulatory agency is needed to facilitate the use of LUCs. These agreements should be within the bounds of existing law and authority and be similar in scope for similar non-Federal property. Such agreements are seen as the exception and should be developed in consultation with the installation’s higher headquarters and Headquarters, Department of the Army.

Federal-to-Federal Property Transfers: For Federal-to-Federal agency property transfers (including transfers between DoD Components) the receiving agency will be responsible for the maintenance and management of the LUCs, unless otherwise agreed to before property transfer.


Requirements Applying Only to Transferring Property

LUC Responsibility: Because many types of LUCs are solely within the jurisdiction of local governments (e.g., zoning) and because the property owner has the most direct control over transferred property, the local government and the property owner should be encouraged to take responsibility for the management and enforcement of LUCs.

State Land Use Control Management Systems: As most LUCs ultimately will be memorialized in the deed as deed restrictions, the disposal agent in drafting the restriction should consult both state property law and state environmental law. The state may require the use of a particular type of instrument or operative language.

Requirement Applying Only to Active Installations

Land Use Compatibility: Because the use of an area containing LUCs may change, it is important for the installation to ensure that land use activities remain compatible with the restrictions on land use. The installation should institute a process to review and evaluate the effect of human health and the environment of any proposed land use changes for areas with LUCs. The Army will have the authority over land use planning and can internally restrict and control use on active installations.



More Information

Office of the Deputy Under Secretary of Defense
(Environmental Security), BRAC Environmental Program
Fact Sheet, Spring 1997, *Institutional Controls: What
they are and how they are used*, [http://www.dtic.mil/
envirodod/brac/ic.html](http://www.dtic.mil/envirodod/brac/ic.html).

Department of the Army, Assistant Chief of Staff for
Installation Management, Memorandum, subject: Army
Guidance on Using Institutional Controls (ICs) in the
CERCLA Process, September 4, 1998.


Office of the Under Secretary of Defense, subject: Draft
DoD Interim Land Use Controls Policy and Guidance,
August 31, 2000, [http://www.denix.osd.mil/Public/Library/
Cleanup/lucs.pdf](http://www.denix.osd.mil/Public/Library/Cleanup/lucs.pdf)

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- ¹ The legal mechanisms used for LUCs are the same as those used for institutional controls (ICs), as defined in the National Contingency Plan. ICs are primarily legal mechanisms imposed to ensure that restrictions on land use development as part of a remedy design stay in place.
 - ² FSs already in progress after October 31, 2000 should attempt to conform to this requirement where practicable and possible.